Public Prosecutor v Chew Chee Wah

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 41-16-1995
ABDUL MALIK ISHAK J
10 OCTOBER 1995

Criminal Procedure *— Sentence — Adequacy of sentence — Criminal breach of trust — First offender — Public interest — Whether custodial sentence appropriate*

The respondent pleaded guilty to the offence of criminal breach of trust contrary to s 408 of the Penal Code (FMS Cap 45), which provided that any person convicted of the offence shall be punished with imprisonment for a term not less than a year and not more than ten years and with whipping and shall also be liable to fine. The learned magistrate, however, bound over the respondent in the sum of RM3,000 cash for a period of three years, presumably under s 295 of the Criminal Procedure Code (FMS Cap 6) (CPC).

The appellant then appealed against the sentence on the ground that the sentence imposed was manifestly disproportionate to the offence committed by the respondent in light of the recent amendment of the provision whereby the penalty was substantially increased.

The respondent submitted that the respondent should be given a chance to be a good citizen and any term of imprisonment would not do him any good. Being a first offender and having a good solid family background and the fact that the respondent chose to plead guilty on two occasions, the court should confirm the binding over order by the learned magistrate.

Held, allowing the appeal:

(1) It did not make any difference between a maximum and minimum penal term that was provided in the statute and it did not displace the provision of s 294 CPC which, in effect, allowed for suspension of any sentence instead of sentencing him at once to any punishment.

(2) A first offender should be dealt with by the imposition of a fine or by placing him under bond or probation, but he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it was committed.

(3) For a young man, the respondent acted in a calculative manner to collect those sums without thinking of its consequences. To accede to the respondent's request would open the floodgate and white collar offenders would simply flout the law with impunity. That was surely not the intention of the legislature

in amending the penal strictures by incorporating the minimal penal servitude in s 408 of the Penal Code.

(4) A sojourn in prison for the minimal term as allowed by s 408 would certainly do good to the respondent and the order of whipping would serve as a grim reminder to the respondent that crime did not pay.

[Bahasa Malaysia summary

Penentang telah mengaku salah kepada kesalahan pecah amanah jenayah bertentangan dengan s 408 Kanun Keseksaan (NMB Bab 45), yang memperuntukkan bahawa sesiapa yang sabit kesalahan itu akan dihukum dengan pemenjaraan untuk tempoh tidak kurang daripada satu tahun dan tidak lebih daripada sepuluh tahun dan dengan sebatan dan juga akan dikenakan denda. Majistret yang bijaksana, walau bagaimanapun, melepaskan penentang atas jaminan sebanyak RM3,000 tunai untuk tempoh tiga tahun, mungkin sekali di bawah s 295 Kanun Acara Jenayah (NMB Bab 6) ('KAJ').

Perayu kemudiannya merayu terhadap hukuman itu atas alasan bahawa ianya sangat tidak berkadaran dengan kesalahan yang dilakukan oleh penentang memandangkan pindaan kepada peruntukan itu baru-baru ini di mana penaltinya telah dinaikkan dengan banyak.

Penentang berhujah bahawa beliau sepatutnya diberikan peluang menjadi seorang warganegara yang baik dan sebarang tempoh pemenjaraan tidak akan membawa faedah kepadanya. Memandangkan yang beliau adalah pesalah kali pertama dan mempunyai latar belakang keluarga yang kukuh dan hakikat bahawa beliau telah memilih mengaku salah dua kali, mahkamah patut mengesahkan perintah pelepasan atas jaminan yang dibuat oleh majistret.

Diputuskan, membenarkan rayuan itu:

(1) Tidak membawa apa-apa perbezaan di antara penalti maksima dan minima yang diperuntukkan di dalam statut itu dan ianya tidak mengeluarkan peruntukan s 294 KAJ yang, pada hakikatnya, membenarkan penggantungan mana-mana hukuman sebagai ganti penjatuhan hukuman serta-merta ke atasnya.

(2) Seorang pesalah kali pertama sepatutnya dikenakan denda atau diletakkan di bawah jaminan atau percubaan, tetapi ianya patut dijauhkan daripada penjara melainkan terdapat, dalam kepentingan awam, sebab-sebab kuat untuk memerintahkan satu tempoh pemenjaraan, misalnya betapa beratnya kesalahan itu dan cara ia dilakukan.

(3) Sebagai seorang muda, penentang telah bertindak dalam cara yang terlalu mengira apabila beliau mengutip jumlah-jumlah

tersebut tanpa memikirkan kesan-kesannya. Jika mahkamah bersetuju dengan permintaan penentang, ini akan membuka 'floodgate' dan pesalah-pesalah kolar putih akan melanggar undang-undang dengan sewenang-wenangnya. Itu tentunya bukan tujuan badan perundangan apabila ia meminda hukuman dengan memasukkan tempoh pemenjaraan minima ke dalam s 408 Kanun Keseksaan.

(4) Tempoh pemenjaraan minima seperti yang dibenarkan oleh s 408 tentuya akan membawa manfaat kepada penentang dan perintah sebatan akan bertindak sebagai peringatan kepada penentang bahawa jenayah tidak menguntungkan.]

Notes

For cases on adequacy of sentence, see 5 *Mallal's Digest* paras 2214–2233 (4th Ed, 1994 Reissue); [1992] *Mallal's Digest* paras 793–795; [1994] *Mallal's Digest* para 1107.

Cases referred to

Chan Sit Hoon v PP [1975] 1 MLJ 261 (folld)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66 (folld)
Long bin Samat v PP [1974] 1 MLJ 152 (folld)
Man bin Ismail v PP [1939] MLJ 207 (refd)
PP v Idris [1955] MLJ 234 (refd)
PP v Lee Tin Bau [1985] 1 MLJ 388 (folld)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (folld)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Yeoh Eng Khuan [1976] 1 MLJ 238 (folld)
Teo Siew Peng & Ors v PP [1985] 2 MLJ 125 (refd)
Tukiran bin Taib v PP [1955] MLJ 24 (refd)
Tulsidas Chhaganlal (1906) 8 Bom LR, 5 Cr L J 5 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2, 173A, 294(1)
Penal Code (FMS Cap 45) s 408

Azman bin Abdullah (Deputy Public Prosecutor) for the appellant.
CY Ong (*Ong & Ong*) for the respondent.

Abdul Malik Ishak J: The respondent was charged before the learned magistrate, magistrate's court, Johor Bahru on the following charge:

Bahawa kamu pada 6 April 1994 di Ngaifoam Trading (M) Sdn Bhd, No: 6, Jalan Riang 22, Taman Gembira, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, sebagai jurujual syarikat tersebut yang telah di amanahkan unuk membuat kutipan ke atas jualan barangan kepunyaan syarikat, telah tidak menyerahkan wang tunai serta cek-cek bernilai RM45,544.90 dari pelanggan-pelanggan syarikat tersebut kepada majikan, sebaliknya menyalahgunakan wang dan cek-cek tersebut untuk kepentingan peribadi. Oleh yang demikian, kamu telah melakukan kesalahan yang boleh di hukum di bawah seksyen 408 Kanun Keseksaan.

On 5 October 1994 when the respondent was produced before the learned magistrate, he pleaded guilty to the charge with the benefit of his learned counsel by the name of Mr CY Ong. After listening to the mitigation advanced on the respondent's behalf by his learned counsel and the reply thereof by the prosecuting officer, the learned magistrate, having found the respondent guilty to the charge and convicted him accordingly, imposed a fine of RM5,000 in default ten months' imprisonment. A sum of RM1,010 which was seized from the respondent and marked as exh (P4) was rightly ordered to be returned to Ngaifoam Trading (M) Sdn Bhd (the company).

However, the learned magistrate must have realized that by the Penal Code (Amendment) Act 1993 vide Act A860, s 408 of the Penal Code (FMS Cap 45) was amended by substituting for the words 'may extend to ten years, and shall also be liable to fine' the words 'shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.' This amendment was published in the Government gazette on 16 September 1993 and by the following day it became law. Having realized the rather embarrassing position in which he had put himself, the learned magistrate sent up the papers for revision and, on revision, the case was remitted back to the learned magistrate to consider afresh. Once again, on 28 February 1995, the respondent was produced before the learned magistrate (from the appeal record, a different magistrate) on the same charge and, surprisingly, the respondent still pleaded guilty to the same charge. After having heard the facts as narrated by the prosecuting officer to which the respondent admitted as correct, the learned magistrate proceeded to record the respondent's guilt and convicted him accordingly. The learned magistrate then adjourned the case for sentencing pending a report from the probation officer. It must be stressed that the respondent had the benefit of the same learned counsel in the person of Mr CY Ong when he pleaded guilty to the same charge the second time round. When the case finally came up for sentencing before the learned magistrate on 4 April 1995 with the benefit of the probation report, the learned magistrate bound over the respondent in the sum of RM3,000 cash for a period of three years presumably under s 294(i) of the Criminal Procedure Code (FMS Cap 6) (CPC). I say that it was a matter of assumption because the appeal record was silent as to what provisions of the CPC the learned magistrate resorted to in binding over the respondent. Be that as it may, Encik Azman bin Abdullah, the learned deputy public prosecutor, argued that the sentence imposed was manifestly disproportionate to the offence committed by the respondent bearing in mind that the legislature had through an amendment to s 408 of the Penal Code saw it fit to increase the penal imprisonment and he urged me to set aside the binding over under s 294 of the CPC and substitute it with the minimum term of imprisonment as provided for under s 408 of the Penal Code. Mr CY Ong strenuously argued that the respondent should be given a chance to be a good citizen as any term of imprisonment would not do him any good. Being a first offender and having a good solid family background and the fact that the respondent chose to plead

guilty on both occasions were said to be factors that should influence this court to confirm the binding over as ordered by the learned magistrate.

It is appropriate, at this juncture, to set out the facts as admitted by the respondent before the learned magistrate. In stark terms, the facts were that the respondent as a sales executive of the company was empowered, inter alia, to collect payments either in the form of cash or cheque from the customers of the company. The respondent went on a calculated spree of collecting such payments from twenty four companies and instead of remitting the collections to his company, he pocketed all those collections totalling RM45,544.90. It was said that the respondent committed the said offence within a short span of two weeks after he was employed by the company. Somehow, the marketing manager of the company detected the financial short fall and reported the matter to the police. When the police arrested the respondent a sum of RM1,010 was seized from him and this was the restitution sum which the respondent restored to the company.

Section 294(i) of the CPC enacts as follows:

> When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any court if it appears to such court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

A youthful offender is defined under s 2(i) of the CPC to include:

> ... any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of ten and under the age of sixteen years in the opinion of the court before which such child is convicted.

At the time of the offence the respondent was said to be 20 years four months 16 days bearing in mind that he was born on 20 November 1973 and he would clearly fall outside the ambit of a 'youthful offender'.

Section 408 of the Penal Code reads as follows:

> Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

There are a dearth of authorities to show that the words 'shall be punished with imprisonment' require the court to impose imprisonment, even if it be for one day. Unlike the case of *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125, the High Court there had to consider whether s 294

of the CPC applied to an offender who was a youthful offender at the time of the commission of offence but had since ceased to be one at the time of sentencing or appeal, Tan Chiaw Thong J whilst delivering the judgment of the court noted the difference in wording of ss 293(i) and 294(i) of the CPC where in the former the terms 'is convicted' was used, whereas in the latter the terms 'has been convicted' was employed and his Lordship then concluded and observed that 'having regard to the power conferred upon this court in appropriate cases to alter the nature of the sentence of the appellant, s 294 does not debar this court from invoking it if the appellant at the time of the appeal has ceased to be a youthful offender'. His Lordship then proceeded, in regard to the third appellant, to release him on a bond to be of good behaviour under s 294 of the CPC. Here, at the time of the commission of the offence and at the time of sentencing the respondent was not a youthful offender and on a plain reading of s 294(i) of the CPC the respondent could be bound over under this section. This seems to be the brunt of Mr CY Ong's submission. In *PP v Idris* [1955] MLJ 234, Thomson J was of the opinion that magistrates should make use of s 294 of the CPC where the offence was said to be generally of serious nature, punishable with imprisonment and committed by an adult offender. All other cases which are thought to call for unusually lenient treatment can appropriately be dealt with under s 173A of the CPC. In my judgment, it makes no difference between a maximum and minimum penal term that is provided in the statute and it does not displace what was stated in *Man bin Ismail v PP* [1939] MLJ 207 because of the phrase 'instead of sentencing him at once to any punishment' appearing in s 294 of the CPC which in effect allows for suspension of any sentence.

In *PP v Loo Choon Fatt* [1976] 2 MLJ 256 the sentence of a bond to be of good behaviour under s 294 of the CPC for a drug offence was altered to six months' imprisonment. In *PP v Teh Ah Cheng* [1976] 2 MLJ 186 the offences were for possession of firearms and ammunition for which the accused who was 18 years of age was bound over to be of good behaviour and on appeal by the public prosecutor, the High Court judge imposed a custodial sentence of three years for each offence. In *PP v Yeoh Eng Khuan* [1976] 1 MLJ 238 the offence was for possession of drugs under s 39A of the Dangerous Drugs Act and the bond under s 294 of the CPC was altered by the High Court judge to three years imprisonment on an appeal by the public prosecutor. Lest I be accused of an oversight, I took note of what Bellamy J said in *Tukiran bin Taib v PP* [1955] 21 MLJ 24 that 'it is very desirable that a young first offender who is between the ages of 17 and 21 should be kept out of prison, if possible.' But this must be read in the context of *Chan Sit Hoon v PP* [1975] 1 MLJ 261 where it was held that:

> A first offender, be he on a drug charge or some other criminal charge, should be dealt with by the imposition of a fine or by placing him under bond or probation, but he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it is committed ...

Here, an appropriate question to pose would be this. Are there strong reasons, in the context of the public interest, to order a term of imprisonment on the respondent instead of binding him over under s 294 of the CPC? On the authority of *Tulsidas Chhaganlal* (1906) 8 Bom LR 951, 5 Cr LJ 5 the offence under s 408 of the Penal Code is said to be committed even where the act of the accused is said to cause wrongful loss to his master for a time only. From the facts, the respondent here committed the offence on 6 April 1994 but there were other transactions in 1993 involving various sums of money received from various customers as reflected in exh (P3) but the public prosecutor saw it fit not to prosecute him and this is entirely the discretion of the public prosecutor which this court is not entitled to comment: *PP v Lee Tin Bau* [1985] 1 MLJ 388, *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66; and *Long bin Samat v PP* [1974] 1 MLJ 152. For a young man, the respondent acted in a calculative manner to collect those sums without thought for its consequences. He is saying: 'I have committed a criminal breach of trust of RM45,544.90. I am sorry. I am making a restitution of RM1,010. Please do not send me to prison. Please give me a second chance. I come from a good family.' To accede to the respondent's request would open the floodgate and white collar offenders would simply flout the law with impunity. This is surely not the intention of the legislation in amending the penal strictures by incorporating the minimal penal servitude in s 408 of the Penal Code. A sojourn in prison for the minimal term as allowed by s 408 of the Penal Code would certainly do good to the respondent and the order of whipping too would serve as a grim reminder to the respondent that crime does not pay.

For the reasons adumbrated above, I refused to exercise my discretionary power to bind the respondent under s 294 of the CPC and, accordingly, I set aside the order of the learned magistrate and substituted it with a term of imprisonment of one year commencing from 10 October 1995 and imposed two strokes of the rattan. It goes without saying that the discretion exercised by me was carried out judicially and within the framework of the meaning of 'discretion' as set out in *Words and Phrases Legally Defined* Vol 2 (2nd Ed) at p 82 which reads as follows:

> 'Discretion' means that when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's* case (1598) 5 Co Rep 996; according to law and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v Rastall* (1972) 4 Term Rep at p 757. (*Sharp v Wakefield* [1891] AC 173, HL, per Lord Halsbury LC at p 179).

On a lighter note, I must point out that only a minimal whipping of two strokes were ordered, which was a mere token gesture for the respondent bearing in mind that twenty-four strokes could have been ordered

against him as envisaged under s 288(i) of the CPC. It is my ardent hope that the imprisonment will correct, reform and rehabilitate the respondent so that by the time he rejoins society he is equipped to be a responsible and a law-abiding citizen.

Appeal allowed.

Reported by Victor T Gidwani